

(36)
4:30

ORIGINAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD C. WOJEWODZKI,

Plaintiff,

v.

CONSOLIDATED FREIGHTWAYS,
INC.,

Defendant.

CIVIL ACTION NO. 1:CV 01-285

/ JUDGE SYLVIA H. RAMBO HARRISBURG, PA

APR 29 2002

MARY B. D'ANDREA, CLERK
Per RB Deputy Clerk

JURY TRIAL DEMANDED

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S OBJECTIONS TO THE
MAGISTRATE'S REPORT AND RECOMMENDATION**

Consolidated Freightways Corporation of Delaware (incorrectly named in the caption as Consolidated Freightways, Inc.) (hereinafter "CF"), through its attorneys, hereby submits its Memorandum in Opposition to Plaintiff's Objections to the Magistrate's Report and Recommendations in accordance with United States District Court for the Middle District of Pennsylvania Local Rule of Civil Procedure 72.3.

I. INTRODUCTION

On February 19, 2002, CF filed its Motion for Summary Judgment. The parties fully briefed the issues involved, and submitted these briefs to Magistrate Judge Smyser. On April 10, 2002, Judge Smyser issued a report and recommendation that recommended granting CF's motion. On April 18, 2002, Plaintiff filed his objections to Judge Smyser's report and recommendations.

II. ARGUMENT

As an initial matter, CF reasserts the positions set forth in its Supporting Memoranda and Reply Memoranda. While CF respectfully disagrees with Judge Smyser's conclusion that a genuine issue of material fact exists relative to whether

Plaintiff was replaced by a substantially younger person, it agrees that Plaintiff failed to demonstrate pretext. Plaintiff's current attempt to reargue issues that were fully briefed previously should be given no weight.

Plaintiff's lone new argument – that Judge Smyser relied on inadmissible hearsay – ignores the specifics of Judge Smyser's report. Namely, he correctly found Plaintiff cannot demonstrate that CF's proffered legitimate business reasons were a pretext for unlawful discrimination. Thus, Plaintiff previously admitted CF offered a legitimate business reason for his removal. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Opposition Memo") at 4. Furthermore, Plaintiff admitted that the underlying issues upon which CF based his removal were also true – namely that attrition and penalty pay were problems while Plaintiff was in charge of CF's Carlisle line haul. Id.

Consequently, Plaintiff's assertion that Judge Smyser erred when he admitted certain statements made by Mr. Ferguson to Mr. Rice is a "red herring," as that statement does not detract from Judge Smyser's report or recommendation. Consequently, even if these statements are excluded, the outcome is the same – Plaintiff still is unable to demonstrate that CF's articulated, legitimate, business reasons for removing Plaintiff are mere pretext for illegal discrimination. Thus, Judge Smyser's recommendation should be accepted.

III. CONCLUSION

For the reasons set forth above, the reasons set forth in its Memorandum of Law in Support of its Motion for Summary Judgment, and its Reply to Plaintiff's Memorandum of Law in Opposition to CF's Motion for Summary Judgment, CF

respectfully requests that this Court deny Plaintiff's objections and accept Magistrate Judge Smyser's recommendation granting CF's Motion for Summary Judgment.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Vincent Candello", written over a horizontal line.

VINCENT CANDIELLO
G. SCOTT PATERNO
One Commerce Square
417 Walnut Street
Harrisburg, PA 17101-1904
717.237.4000

Of Counsel:

MORGAN, LEWIS & BOCKIUS LLP

Dated: April 29, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant's Opposition to Plaintiff's Objections to the Magistrate's Report and Recommendation has been served via U.S. Mail, postage prepaid, on this **29th day of April, 2002**, upon the following:

Lawrence L. Markowitz, Esquire
Markowitz & Krevsky, P.C.
208 E. Market Street
P.O. Box 392
York, PA 17405-0392



G. SCOTT PATERNO